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CHARLES ELMORE CROPLEY

NO. 443

In the Supreme Court of the United States

OCTOBER TERM, 1951.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

ETROM SPECTOR.

Appeal from the United States District Court for the Southern District of California.

STATEMENT AS TO JURISDICTION.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 21844 CR

UNITED STATES OF AMERICA

v.

EFROIM SPECTOR.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, and Rule 37(a) of the Federal Rules of Criminal Procedure, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy thereof is attached hereto as an appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered September 12, 1951. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an indictment, where such dismissal is based on the unconstitutionality of the statute on which the indictment is founded, is conferred by the Criminal Appeals Act, 18 U.S.C. 3731. See also Rules 37(a)(2), F. R. Crim. P.

QUESTION PRESENTED

Whether that portion of Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, 8 U.S.C. 156(c), which provides criminal penalties against an alien, ordered deported for advocating the overthrow of the Government by force and violence, who shall within six months after the effective date of the Internal Security Act "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure" is sufficiently definite to meet constitutional standards of due process.

STATUTE INVOLVED

Section 20(c) of the Act of February 5, 1917, as amended by Section 23 of the Internal Security Act of 1950, chapter 1024, 64 Stat. 1010, 8 U.S.C. 156(c), provides, in pertinent part, as follows:

> Any alien against whom an order of deportation is outstanding under * * *(4) so much of section 19 of the Immigration Act of 1917, as amended * * * as relates to criminals, prosti-

tutes, procurers, or other immoral persons, anarchists, subversives and similar classes, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or, from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: * * *

STATEMENT

An indictment in four counts was returned against defendant in the United States District Court for the Southern District of California, alleging that he was an alien who had entered the United States from Russia in 1913; that an order of deportation had been entered against him in 1930 on the ground that he advocated the overthrow of the Government by force and violence; and that within six months after September 23, 1950, he had (1) willfully failed to depart; (2) willfully failed to make timely application in good faith for travel documents necessary to his depar-

ture; (3) willfully refused to depart; (4) willfully refused to make timely application in good faith for travel documents necessary to his departure.

The defendant moved to dismiss the indictment on the ground, *inter alia*, that the statute was unconstitutionally vague and indefinite. The District Court overruled the motion as to counts 1 and 3 charging failure and refusal to depart, but sustained the motion as to counts 2 and 4, charging failure and refusal in good faith to make timely application for travel documents necessary to his departure. The court held that the portion of the statute under which these counts were laid was vague and indefinite in two respects: (1) it did not specify the nature of the travel documents necessary for departure; (2) it did not specify to which country or how many countries the alien should make application.

THE QUESTION IS SUBSTANTIAL

At the time of the enactment of the Internal Security Act of 1950, more than 3,000 outstanding orders of deportation were found to be unenforceable because the country of origin would not receive the alien (Hearings before Subcommittee 1, House Judiciary Committee on H.R. 10, pp. 4-5).[1] By enacting the statute here involved, Congress intended to require certain groups of such aliens, including those ordered deported for advocating the overthrow of the Government by force and violence to make some efforts in their own behalf to

[1] Section 23 is an outgrowth of the so-called Hobbs Bill, H. R. 10, 81st Cong. (see S. Rep. 2369, 81st Cong.).

leave the United States.[2] The decision below substantially nullifies that congressional directive since the first step which an alien must take to effectuate his departure is to obtain travel documents from the country to which he wishes to go. The inability to penalize an alien who refuses to make such application will seriously hamper the enforcement of the statute.

The District Court's ruling that the statute is unconstitutionally indefinite, in that travel documents are not defined by the statute and might be construed to include a ticket to Mexico, is clearly without merit. "Travel documents" in relation to journeys to foreign countries would normally be understood to mean such papers as passports and visas—those documents required in order lawfully to enter another nation; obviously Congress could not and did not intend to require an alien to violate the laws of another country by entering that country illegally. Indeed, in another portion of Section 23(c) of the Internal Security Act, which provides that a court may suspend the sentence of an alien, it is specified that one of the factors to be considered is the reason for the inability of the United States "to secure passports, other travel documents, or deportation facilities." It is thus clear that the statute uses travel documents in the sense of passports, visas, and the like. The Su-

[2] In hearings on the Hobbs Bill, the Commissioner of Immigration pointed out that experience had shown that aliens often could arrange to leave this country even after their governments had refused to issue travel documents at the request of the United States (Hearings before Subcommittee 1, House Judiciary Committee on H. R. 10, p. 9).

preme Court has frequently held that requirements of compliance that are perhaps vague in their literal terms are to be tested by reference to the common usage and understanding to which the requirements relate. *Omacchevarria* v. *Idaho*, 246 U.S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503; *Sproles* v. *Binford*, 286 U.S. 374, 392-393.

As to the second ground of the court's decision, that the statute does not specify the country to which the alien should apply or the number of applications he should make, such fact does not show that the statute is too vague and indefinite to inform the alien of the duty which the law imposes upon him. The statute punishes one who willfully fails to make application in good faith. It is certainly clear that one who makes no application at all to any country has failed to meet the requirements of the statute. Moreover, it is clearly possible for an alien to select a country to which he would like to go; in fact Section 20(a) specifically provides that the alien must be given that choice. If the alien does make a selection and applies for travel documents to the country of his selection, the question then becomes whether such evidence is sufficient to show good faith, or whether some further action must also be taken by the alien. The fact that a jury must decide a question of degree as to whether particular conduct meets the requirement of the statute does not render the statute vague. *Nash* v. *United States*, 229 U.S. 373, 376-378; *United States* v. *Ragen*, 314 U.S. 513, 522-524. The statute here involved is no more vague in this respect than those involved in other

situations in which the Supreme Court has upheld a statute challenged for vagueness. See *Omaechevarria* v. *Idaho*, 246 U.S. 243, 348 (grazing sheep "upon any range usually occupied by any cattle grower either as a spring, summer or winter range for his cattle"); *United States* v. *Alford*, 274 U.S. 264, 267 (building a fire "near" forest or inflammable material upon the public domain); *Bandini Co.* v. *Superior Court*, 284 U.S. 8, 17-18 (an "unreasonable waste" of gas where it "has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion"); *Sproles* v. *Binford*, 286 U.S. 374, 392-393 ("nearest practicable common carrier receiving or loading point", by "shortest practicable route," and "point equipped to transport such load"); *United States* v. *Ragen*, 314 U.S. 513, 522-524 ("reasonable" allowance for salaries in determining question of willful evasion of tax); *Screws* v. *United States*, 325 U.S. 91, 101-103 ("willfully" depriving any person "under color of any law" of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); and *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (forcing employment of persons at a broadcasting station "in excess of the number * * * needed by such licensee to perform actual services"). Since the statute requires that the alien must act willfully in refusing to make application in good faith, no alien making an honest attempt to secure travel documents will be subject to penalties. As the Supreme Court said in *United States* v. *Ragen*, 314 U.S. at p. 523, "A mind intent upon willful evasion is inconsistent with surprised innocence."

It is therefore respectfully submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ERNEST A. TOLIN,
United States Attorney.

RAY H. KINNISON,
Assistant U. S. Attorney,
Chief of Criminal Division.

OCTOBER 1951.

APPENDIX

No. 21,844—Criminal

Memorandum of Decision

U. S. District Court

For the Southern District of California
Central Division

United States of America, *Plaintiff*,

v.

Frank Efroim Spector, *Defendant*.

Defendant stands indicted for alleged violations of those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. ——, 8 U.S.C. § 156(c)] which declare that:

> "Any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from September 23, 1950, whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years . . ."

The indictment contains four counts averring that defendant is an alien against whom an order of deportation entered Aug. 13, 1930 is outstanding, and that "during the period of six months from Sept. 23, 1950," defendant did willfully "fail

to depart from the United States" [Count 1]; "fail to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 2]; "refuse to depart from the United States" [Count 3]; and "refuse to make timely application in good faith for travel or other documents necessary to his departure from the United States" [Count 4].

Defendant moves to dismiss the indictment. In support of the motion he urges the above-quoted provisions of § 23 of the Act must be held unconstitutional [see *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886); *Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896)] upon the grounds inter alia that the statute denies defendant due process of law [U. S. Const. Amend. V.], is an ex post facto law [U. S. Const. Art. I, § 9], and imposes cruel and unusual punishment [U. S. Const. Amend. VIII].

In "The Chinese Exclusion Case" [*Chae Chan Ping* v. *United States*, 130 U.S. 581, 606-607, 609 (1889)], the Supreme Court said:

> "The power of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied . . . the power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States . . ."

Later in *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893), the Court declared that:

> "The right of a nation to expel or deport foreigners . . . rests upon the same grounds

and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

The statute at bar was enacted in exercise of this inherent right of sovereignty. The Congress in effect has ordered all aliens against whom an order of deportation is outstanding to depart from this country within a specified period, and provided for the punishment of any who willfully fail or refuse "to depart" or "to make timely application . . . for travel or other documents necessary to . . . departure." [8 U.S.C. § 156(c).]

Defendant asserts that this congressional enactment "is so vague and indefinite that it fails to give due notice of what it punishes", and hence falls within the constitutional prohibition of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The due process clause of the Fifth Amendment requires that "criminal statutes . . . give due notice that an act has been made criminal before it is done . . ." [*Jordan* v. *DeGeorge*, 341 U.S. 223, 230 (1951)] because "Every man should be able to know with certainty when he is committing a crime" [*United States* v. *Reese*, 92 U.S. 214, 220 (1875)]. Hence "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [*Connally* v. *General Construction Co.*, 269, U.S. 385, 391 (1926).]

If challenged as repugnant to the due process clause of the Fifth Amendment, a statute must be tested "on its face"; for it is "the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." [*Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939); *United States* v. *Petrillo*, 332 U.S. 1, 6-7 (1947); cf *Dennis* v. *United States*, 341 U.S. 494, 515 (1951) (opinion of Vinson, C.J.).]

First challenged by defendant are those provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] which declare guilty of a felony "any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse to depart from the United States within a period of six months from . . . September 23, 1950."

I find in this language no uncertainty "which deprives a person of the ability to predetermine whether a contemplated action (omission) is criminal under the provisions of this law." [*Gorin* v. *United States*, 312 U.S. 19, 27 (1941); *id.* at 27, n. 13]. The act commanded to be done, the identity of the group subject to the command, and the time limit for performance, all are clear and specific. That part of the statute which serves as the basis for the first and third counts of the indictment must therefore be held to meet fully the constitutional requirement of certainty within the "due process" clause of the Fifth Amendment.

Next to be considered are the provisions of § 23 declaring guilty of a felony "any alien against whom an order of deportation is outstanding . . . who shall willfully fail or refuse . . . to make timely application in good faith for travel or other docu-

ments necessary to his departure . . ." This portion of the statute is involved in the second and fourth counts of the indictment.

Assuming that "timely application" means an application made early enough to enable the alien "to depart from the United States within a period of six months from the date of . . . order of deportation, or from Sept. 23, 1950, whichever is later" [see 8 U.S.C. § 156(c)], the questions remain (1) for what and (2) to whom shall the application be made.

The statute merely provides that timely application be made "for travel or other documents necessary to his departure." Would "timely" purchase of a Sunday bus ticket to Tijuana across the Mexican border suffice? Or would it be necessary to obtain more formal "travel or other documents necessary to . . . departure" in order to avoid criminality?

If it be assumed the "travel or other documents" referred to must mean passports, visas, permits or the like, there still remains the question whether the statute commands the alien to make "timely application" therefor to only one foreign country, or to all foreign countries maintaining consulates in the city, county and state of the alien's residence, or to all embassies and consulates in the nation's capitol. [See *United States* v. *Evans*, 333 U.S. 483, 486-488, 495 (1948).]

Elaboration seems surplusage. This part of § 23 commands the alien "to determine his conduct not . . . by reference to knowable criteria, but by . . . conjecture . . ." [*Collins* v. *Kentucky*, 234 U.S. 634, 638 (1914).]

Where a criminal statute forbids affirmative ac-

tion, one in doubt as to precisely what is forbidden can escape a charge of criminality by avoiding all conduct closely resembling the uncertain acts so forbidden. [See *United States* v. *Petrillo, supra,* 332 U.S. at 5-8; *United States* v. *Alford,* 274 U.S. 264, 267 (1927); *Omaechevarria* v. *Idaho,* 246 U.S. 343, 348 (1918).] But even that method of compliance is not available where the statute makes criminal an omission or failure to act. For a statute prohibiting an omission is in effect a law commanding action; and no one can foretell compliance unless the command be reasonably specific.

So if specificity be essential to due process, and hence to the constitutionality of criminal statutes forbidding affirmative action [see *United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89 (1921); *Stromberg* v. *California,* 283 U.S. 359, 369 (1931); *Herndon* v. *Lowry,* 301 U.S. 242, 261-264 (1937)], statutes making criminal an omission should a multo fortiori specifically declare what action is required for compliance, to the end that all may know precisely what affirmative conduct is required to avoid commission of a crime. [See *Screws* v. *United States,* 325 U.S. 91 (1945).]

The government however points to the fact that § 23 specifies one must "willfully" fail or refuse to perform the acts commanded in order to commit the offense, and urges that despite any indefiniteness in language the provisions in question give due notice of conduct made criminal because "punishment is imposed only for a neglect of duty knowingly omitted with the purpose of omitting that which the statute requires." But again, although the element of willfulness may compensate for some lack of specificity in a criminal statute

forbidding affirmative acts [see *Williams* v. *United States*, 341 U.S. 97, 101 (1951); *Communications Ass'n* v. *Douds*, 339 U.S. 382, 413 (1950); *Screws* v. *United States, supra*, 325 U.S. at 101; *United States* v. *Ragen*, 314 U.S. 513, 524 (1942); *Omaechevarria* v. *Idaho, supra*, 246 U.S. at 348], it can serve no such purpose where as here the statute condemns inaction and constitutes in effect a command to do some vague and indefinite act or series of acts.

Since all are entitled to be informed—indeed are presumed to know—what the law forbids and what the law commands [*Hamburg-American Line* v. *United States*, 291 U.S. 420, 426 (1934)], the law should not "lag behind common sense." [*Ludecke* v. *Watkins*, 335 U.S. 160, 166-167 (1948).] And common sense as well as our concept of due process of law dictate that standards of proscribed conduct be even more definite where the conduct forbidden is an omission. [See *Viereck* v. *United States*, 318 U.S. 236, 241-243, 245 (1943).]

The provisions of § 23 of the Internal Security Act of 1950 [64 Stat. —, 8 U.S.C. § 156(c)] upon which the second and fourth counts of the indictment are based must therefore be held to be too vague and uncertain to meet the essential requirements of due process of law within the Fifth Amendment.

Defendant's remaining contention of unconstitutionality cannot be sustained. In view of the nation's inherent right to expel and deport aliens [*Fong Yue-Ting* v. *United States, supra*, 149 U.S. at 707], punishing those against whom an order of deportation is outstanding who "willfully fail or refuse to depart" [8 U.S.C. § 156(c)] is clearly

not a violation of due process. Nor is maximum punishment of ten years imprisonment for such an offense "cruel and unusual" within the meaning of the constitutional limitation. [U. S. Const. Amend. VIII; *Becker* v. *United States*, 91 F. 2d 550 (9th Cir. 1937); *United States* v. *Sorcey*, 151 F. 2d 899, 902-903 (7th Cir. 1945), *cert. denied* 327 U. S. 794 (1946); cf. *Weems* v. *United States*, 217 U.S. 349 (1910).] And since the conduct proscribed by the provision "willfully fail or refuse to depart" is only such as occurs more than six months after the date of enactment of the statute [see 8 U.S.C. § 156(c)], it is not an "ex post facto Law." [U. S. Const. Art. I, § 9; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 721 (1951).]

Defendant urges dismissal upon the further ground that the third and fourth counts of the indictment charge the same offenses as the first and second counts. It is permissible to charge a single offense in different ways and separate counts, but upon conviction punishment may be imposed only for a single offense. [See *Barnes* v. *United States*, 142 F. 2d 648, 650 (9th Cir. 1944); *United States* v. *Bent*, 175 F. 2d 397, 400 (8th Cir. 1949); Fed. R. Cr. P. 8(a); 2 Wharton's Criminal Evidence § 1033 (11th ed. 1935); cf. *Catrino* v. *United States*, 176 F. 2d 884, 888 (9th Cir. 1949).]

For the reasons stated defendant's motion to dismiss should be and is hereby granted as to the second and fourth counts of the indictment and denied as to the first and third counts.

WM. C. MATHES,
United States District Judge.

SEPTEMBER 12, 1951.

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